DOCUMENT RESUME

ED 192 912 PS 011 736

TITLE	Legal and Program Issues Related to Child Custody and Late Parents.
INSTITUTION	Southern Regional Education Board, Atlanta, Ga. Training for Child Care Project.
SPONS AGENCY	Carnegie Corp. of New York, N.Y.; Levi Strauss Foundation, Inc., San Francisco, Calif.
PUB DATE	79
NOTE	21p.; Day Care Administration Bulletin #3.
EDRS PRICE	MF01/PC01 Plus Postage.
DESCRIPTORS	Adopted Children; Child Neglect; *Day Care; Divorce; *Family Problems; *Legal Problems; *Legal Responsibility; Marital Instability; *Parent Responsibility; *Parent Teacher Cooperation

ABSTRACT

This bulletin, the third in a series on selected issues in day care, addresses two problems involving legal issues: (1) what are the implications for the day care program when parents or other legal guardians are involved in a dispute over the custody of children? and (2) what are the rights and responsibilities of day care programs when parents fail to pick up children at the end of the day? The discussion focuses in detail on how to develop a well though out plan which concentrates on preventing unpleasant incidents before they occur. Legal definitions of custody, divorce, separation, adoption, child abuse, and child neglect are given and strategies and procedures concerning verification of parents' rights to custody, and settlement of disputes between parents over child visitation at the center are discussed. The problem of late parents and liability of the center in caring for children after closing hours is discussed in terms of the issues of supervision, responsibility, authority, and suspected child neglect. (Author/SS)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED192912

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
NATIONAL INSTITUTE OF EDUCATION

THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

LEGAL AND PROGRAM ISSUES RELATED TO CHILD CUSTODY AND LATE PARENTS

Day Care Administration Bulletin #3

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Southern Regional Education Board
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

TRAINING FOR CHILD CARE PROJECT

Southern Regional Education Board
130 Sixth Street, N.W.
Atlanta, Georgia 30313

1979

PS011736

PREFACE

The Southern Regional Education Board (SREB)* through its Commission on Mental Health and Human Services has been interested in day care since 1970 when it coordinated the Southeastern Day Care Project, a three-year effort to improve day care services in eight Southeastern states. In 1976, SREB initiated the Training for Child Care Project through financial support from the Carnegie Corporation and the Levi Strauss Foundation. The current effort is designed to improve training for day care in the South in the areas of day care administration, parent-caregiver relationships, and family day care.

Workshops are provided for day care staff and for those responsible for conducting training, such as faculty of universities, community colleges, vocational-technical schools, trainers in state agencies and licensing workers.

A series of publications and bulletins is being developed and will be distributed to day care providers and trainers.

Legal and Program Issues Related to Child Custody and Late Parents is the third of a series of bulletins related to selected issues in day care.

We wish to express our thanks to the faculty and participants in the many workshops sponsored by the Training for Child Care Project. It is their

---

*SREB is an interstate compact devoted primarily to advancing higher education in the 14 Southern states: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, South Carolina, Tennessee, Texas, Virginia, and West Virginia.

enthusiasm and knowledge which makes this publication possible. Thanks also to Robert Sarver, Esq., for legal advice and leadership in providing legal information to day care programs throughout the South and to Ann Kirkley for research and information which contributed to this publication. Finally, special appreciation is extended to the Carnegie Corporation and Levi Strauss Foundation for making this publication possible.

Nancy E. Travis, Director
Training for Child Care Project

Joe Perreault, Associate Director
Training for Child Care Project.

INTRODUCTION

Day care directors must have extensive knowledge and skill in administration to direct a program effectively. One of the topics which has become particularly important in recent years concerns the legal rights, responsibilities and liabilities of day care organizations. Until recently there have been few publications or training opportunities to help day care directors with questions about legal issues.[1] While information on this topic is becoming available gradually, much more is needed, and all of it should be in layman's language.

Day care directors and trainers who attend the workshops sponsored by SREB have identified a number of concerns which have both legal and programmatic consequences. Two problems most frequently mentioned are: 1) What are the implications for the day care program when parents or other legal guardians are involved in a dispute over the custody of children? and 2) What are the rights and responsibilities of day care programs when parents fail to pick up children at the end of the day?

Based on the experience of the Training for Child Care project staff, these two problems occur at almost every day care program. Both problems require some knowledge of basic legal principles and it is hoped that this bulletin can supply that information. Both problems require common sense, skill in human relationships and, sometimes, the willingness to take a calculated risk to prevent a situation from getting worse. Either problem can create hardships

---

[1] One good resource is Day Care Legal Handbook by William Aikman. Available from Day Care and Child Development Council of America, Inc., 805 - 15th Street, N.W., Washington, D.C. 20005.

for the children involved, other children in the program, parents, staff, and day care agency. Developing a well thought out plan which concentrates on preventing unpleasant incidents before they occur is the best strategy for addressing these questions and will be discussed in some detail in this bulletin.

ISSUES OF CHILD CUSTODY

The most common custody problem occurs when a parent or guardian of a child enrolled in a program instructs the director not to allow an estranged or former spouse to visit or remove the child from the program. Until recently many day care programs have agreed to such requests and attempted to honor them. However, problems arise when the parent in question comes to the program and requests to see or take the child. If the request is denied, the parent may become angry and threatening, a situation which upsets the child, the director, staff and other children of the program and may lead to potential physical danger. Only then does the day care program realize that the question of who really has the legal rights to the child have never really been addressed.

Know the Law

Custody is the legal term which identifies who has immediate responsibility for a child. Ordinarily the natural parents are the child's custodians. Parents can transfer part of their authority over a child to another person or organization. For example, when a child is at a day care program, the program assumes "physical custody" while the parents still retain "legal custody." Physical custody gives the day care program the right to direct and control the child's actions while he or she is under the program's supervision, and it

also includes the responsibility to look after the health and safety of the child.

Through court action natural parents can also have their right of custody modified or removed.

Divorce. Divorce is a legal action which dissolves the marriage contract between a husband and wife. As part of the litigation, the court determines which spouse retains custody of the children and often provides for the other parent to have "visiting privileges." Visiting privileges vary from case to case, and may be as permissive as allowing the other parent to see or have the child several times a week, or as restrictive as limiting the parent to seeing the child only during specified hours in a designated place. Often the other parent may take the child out but must remain within the county of the child's residence. In an increasing number of situations parents are given joint custody.

Separation. Separation is a situation in which a husband and wife choose to live apart, though they have not filed for or obtained a divorce. To clarify questions such as child custody, property right, etc., the law makes it possible for such couples to secure a "legal separation." This action is similar to the divorce procedure in that the court may determine custody and visiting privileges. However, many couples who separate do not immediately take any legal steps. In this circumstance, when the separation is entirely voluntary, both spouses have equal rights to the child. Neither spouse can prevent the other from visiting or picking up the child at the day care program,

and neither spouse has the right to instruct the day care program to refuse the other access to the child.

Adoption. Questions of custody surrounding an adopted child are unusual. In adoptive cases, the biological parent(s) give up all parental rights and seldom know where the child lives or the identity of the adoptive parents. However, there are instances in which the child has been adopted by a relative and then conflicts sometimes arise between the biological parents and adoptive parents. From the legal point of view, the adoptive parents have complete custody of the child and the day care staff should be aware of this.

Cases of Child Abuse or Child Neglect. When natural parents are brought before a court and found guilty of child abuse or neglect, the court may choose to remove custody from the parents and transfer this responsibility to a child protection agency or to a relative. The child protection agency or relative then has custody of the child, although the child's parents may have visiting privileges. As a part of the care and treatment of the child, the protective agency may place the child in a foster home. In a foster home placement, the agency retains legal custody of the child but assigns physical custody to the foster family. If the day care director has any questions about the authority of the natural parents or foster parents to visit or pick up the child, she should contact the child protection agency.

Unmarried Couples. More and more couples are living together and raising children in non-traditional arrangements without a legal marriage contract. The children living in such families may be the children of the couple, or

they may be children of an earlier relationship. In some but not all states, such arrangements are considered to be common law marriages if certain criteria are met.

It is beyond the scope of a day care director to make a determination of the legalities of these situations. When there are signs of trouble brewing, the director should ask the parents involved to obtain legal clarification. If they are unwilling or unable to do so, it may be necessary to ask the parent to withdraw the child from the day care program.

Prevent Conflict Through Established Policies

In every circumstance in which custody has been modified or removed from parents, it is possible to determine who does have custody. Unfortunately, it is not always sufficient to accept the word of the parent who enrolls the child. A spouse who is voluntarily rather than legally separated may not realize the other spouse still has full rights to visit or pick up the child. Or a divorced parent may have such negative feelings against the former spouse that he or she misrepresents the terms of the custody order. Because of these possibilities, many day care programs have adopted regulations about child custody, and make it a policy to thoroughly discuss the topic at the time the child is enrolled.

Requiring a Copy of the Court Order

Many day care programs require that the parent provide a copy of the court order when enrolling a child. This makes it possible for the day care program to know for sure who is entitled to visit or take the child and thus avoid possible problems.

Discussing the Issue at Enrollment

A parent enrolling a child needs to understand that the day care program is not a law enforcement agency and that it cannot attempt to play such a role without risk to other children and staff. For example, even if a day care director knows that a parent is not entitled to take a child, there may be danger in refusing to release the child if the parent becomes angry and threatens violence. The day care director must recognize that the police have both the authority and the responsibility to enforce court orders. It would be appropriate for the day care program to immediately contact the police if a person without custody does not gracefully accept the refusal of the center to release the child.

The parent enrolling the child needs to have these policies explained and to be informed of exactly what actions the program will take if a confrontation develops. It may be that the parent will choose not to enroll the child if he/she is not satisfied with the program's policy -- a decision which a parent is entitled to make. On the other hand, it will help the enrolling parent understand the complications involved in expecting the day care program to take sides in a custody dispute. Often a frank discussion of this type leads to a candid assessment of whether a dispute is apt to occur, and what may be done to prevent such an occurrence. In some cases it has caused both parents to agree that the day care program will be "off limits" in any dispute over custody. In other cases, it has meant cooperation when an incident has occurred.

Be Prepared to Handle Conflict Situations

Despite any strategy of prevention, day care staff must anticipate that disputes over child custody may occur on the premises. In such cases the best

that the staff can do is to deal with that individual in a calm manner and hope he/she is open to reason. Staff should try to defuse the situation by letting the person know that they understand his/her feelings and suggesting some form of compromise, such as visiting on the premises rather than leaving with the child. At such times the day care staff members must recognize that they are dealing with an individual under great stress and that irrational or aggressive behavior could occur, especially if the individual has been using drugs or alcohol and is under the influence of these substances.

If there seems to be any potential for violence, it may be desirable to release the child, but the police should be called as soon as the likelihood of violence becomes apparent. Should the parent leave with the child prior to arrival of the police, complete cooperation with the police would include a description of the person, the car, and the car license number. After such an incident the day care director should write down for the record a complete description of the occurrence and the steps that were taken.

Serious confrontations are not common, but it is much easier for staff members to act in accordance with a well considered plan than to make decisions on the spot. When a plan exists, team work helps. For example, one person may engage the parent in conversation while another calls the other parent or the police if it is indicated.

LATE PARENTS

For a variety of reasons, parents are sometimes late in picking up their children at the end of the day. Day care by its nature is supportive to families, and it is easy to understand why day care programs and their employees are often tolerant of late parents. They understand that working parents are sometimes delayed by job responsibilities, late minute shopping chores, or even the need to get some breathing time between the pace of a hectic day and the time when parental duties must be resumed. While day care programs are willing to accommodate an occasional lateness, most have established policies that parents are expected to notify the program if they anticipate being late and that parents will pay a fee to cover the extra cost of caring for the child for that time. Occasionally, parents will abuse the privilege and then the day care organization must impose a penalty, such as temporary suspension of a child.

While there are many dimensions to the problem of late parents, the situations which require legal knowledge are those instances in which parents are extremely late: they have failed to pick up a child an hour or more after closing time, they have made no apparent effort to contact the program, and all efforts to reach other emergency contact persons designated by the parent have failed. The program is then faced with the problems of how to care for the child and whether to report the situation to a public authority.

Almost all day care programs have experienced this problem, and many have developed written policies to cope with such occasions.

Liability

Liability is a legal term that applies to the determination of financial responsibility for specific actions. When the liability of an individual or organization is in question, the law has established a system of civil court procedures to determine liability.

In the day care field (and in this paper) the concept of "liability" is most often applied in relation to the possibility that a child might receive an injury while under the supervision of the day care program.

A universal principle related to cases of injury is that organizations or individuals can be determined liable only if negligence on their part was a factor in causing the accident. For example, if children were left unsupervised on a playground or if playground equipment was not maintained properly, these failures on the part of the day care program would constitute negligence.

Day care programs should seek advice from a lawyer about liability and negligence before any accident occurs. The issue is to minimize the possibility of incurring liability for the day care organization itself or for employees as individuals. The role of the lawyer is to assess policies and practices of the day care program and advise on the likelihood that any policy or practice will lead to liability should an accident occur. In this role the lawyer seldom is able to give absolute advice but rather comments on the "degree of risk" involved in pursuing various alternative policies. Often the lawyer will

describe the most prudent course the program can take if its primary goal is to reduce liability for accidents but he/she will usually make it clear that other policies are also acceptable. These latter alternatives may simply involve a slightly higher degree of risk.

In relating the issue of liability to the problem of caring for children after closing hours, it is necessary to state the most prudent course, but then to recognize that most day care programs do not follow this advice literally. Rather they weigh the risks to decide which course is most appropriate for them.

Supervision of the Child -- Where and By Whom

The most prudent policy would be to require that the child remain at the day care facility and under the supervision of a staff member whose normal duties include management or supervision within the organization. However, the day care program might choose other alternatives, such as sending the child to the home of a supervisor or employee or asking a non-supervisory employee to care for the child. The risks to the organization or the individual employee if an accident occurred would be somewhat greater.

Responsibility for Physical Custody

The agreement between a day care program and parent to care for a child involves responsibilities for both parties. The day care program accepts "physical custody" of the child. This implies that the program will provide adequate supervision and an environment which insures the health and safety of the child. The parent in turn accepts the responsibility for picking up the child at an agreed upon time and being aware of the practices and routines of the program (e.g., closing time).

Even though the parent may fail to live up to his/her end of the agreement, the day care center is still responsible for the physical custody of the child until he or she is returned to the parents or to a person designated by the parents. If an accident should occur after the end of the normal work day, the program would be liable for injury just as it would have if the accident occurred during the normal hours of operation. Consequently the day care program should insure that the child receives the same degree of safe and healthy supervision after normal work hours as during them.

Remaining at the Day Care Facility

The emphasis on keeping the child at the day care facility stems from the previous idea that the program continues to be liable for a child as long as the child remains in physical custody. The day care program has been inspected by various regulatory agencies to meet sanitation, life and fire safety, and day care licensing standards. If a child is sent to the home of an employee, even though it is an acceptable home, it does not offer the same official assurance that comes automatically with keeping the child at the day care center.

There are circumstances which will make it difficult for a day care program to follow the course of least risk. For example, many programs operate their own transportation. The transportation worker may have taken the child home but found that no one was present to receive the child. If the transportation worker's home is nearby and the day care center is far away, many programs would ask the transportation worker to take the child to his/her own home, but they should know the risk of liability has increased by that decision.

Care for the Child by a Supervisor

The basis for suggesting that a supervisory level worker should care for any child not picked up after closing time is primarily a programmatic one. Many day care directors and other authorities feel that the problem of a child left after closing is sufficiently serious to require the attention of a staff member with administrative authority. This person might be the day care director, education specialist, or the supervisor of a particular classroom, but it should be a person who is normally expected to make judgments and speak for the day care organization.

Conversely it is inappropriate to expect an entry level worker or other hourly wage worker to take on this responsibility. Eventually several serious decisions will have to be made including whether efforts should be made to continue contacting parents, whether to report the incident as suspected child neglect, how long to care for the child before requesting the child protection agency to pick up the child, etc. Even with written policies to guide the worker, there is still an important element of judgment involved. In general this is the kind of responsibility that should only be expected of supervisory level workers.

Removing the Liability Risk of Individual Employees

There are circumstances in which an individual employee might be determined personally liable for an accident to a child instead of or in addition to the organization which operates the day care program. These are usually instances of clear negligence on the part of the employee. Most day care employers protect their employees from incurring personal liability by instituting certain administrative policies.

To understand this issue, it is necessary to explain briefly the legal concept of "scope of authority." According to Wil Aikman:

> The principle of scope of authority is based on the notion that ordinarily an employee is hired to perform a general range of duties of a certain type and that there are customary expectations about what those duties involve and how they will be performed. When an employee's actions are consistent with those expectations, the employee is said to be "acting within the scope of authority" of the job. Long ago the law developed a rule that when an employee is acting within the scope of authority of his or her job, the employee is not personally liable for the financial consequences of his or her actions; and when an employee's actions are outside the scope of authority, he or she will be held personally liable.[1]

In the opinion of some legal authorities, caring for children after the day care program is officially closed is an unusual circumstance and might not be considered within the normal scope of authority of an employee. As a way of protecting its employees, the day care organization should develop written policies that specifically identify which employees are authorized to care for children after official working hours and provide instructions concerning the care and supervision to be carried out. This extra measure of protection for employees may be especially important in those situations in which an employee is requested to take a child to his/her own home.

Placing Liability in its Proper Perspective

The discussion of liability is a complicated matter and can finally be determined only by a court in relation to the facts of a specific case. Because considerable attention has been given to liability in this paper, it is important to place the subject in its proper perspective. In discussing the liability of a day care organization when a child has been left after closing

---

[1] Day Care Legal Handbook.

hours, a hypothetical assumption has been made that the child has been injured and that negligence on the part of the organization contributed to the injury. This is a highly unlikely set of circumstances which would occur only rarely. However, the day care organization should recognize that these circumstances might occur and should develop appropriate policies for supervision of the child.

Child Abuse and Neglect Laws

An important factor in deciding what to do when children have not been picked up by their parents after closing hours is whether the state's Child Abuse and Neglect laws require reporting of suspected neglect. A common provision in most state Child Abuse and Neglect laws requires that certain professional persons must report instances of possible child abuse or neglect. Civil or criminal penalties are imposed on the professional who willfully fails to do so. Most of the state laws specifically mention day care personnel among the groups of professionals who must report suspected child abuse or neglect.

Defining Child Neglect

While the laws are usually clear in defining what constitutes child abuse, they are less clear in defining what constitutes child neglect. It is reasonable to assume that parents have committed acts of child neglect if they fail to pick up their children for a long time after closing and fail to communicate with the program to explain the delay. However, no child abuse or neglect law is so precisely written as to confirm that such an incident is definitely child neglect and subject to reporting. The day care director and staff must judge the circumstances. For example, if the day care program director knows

the parents well and there had been no previous episodes of this kind, it might be justifiable to delay reporting the incident. A medical emergency or automobile accident may be the cause of the delay. On the other hand, if the family has a history of child neglect, the day care program should consider immediate reporting.

Even though the day care program director must exercise some judgment about when to report, the overriding issue is that suspected child abuse and neglect must be reported and that instances of extreme lateness by parents are a form of child neglect.

Developing Policy for the Day Care Organization

The inclusion of day care personnel among the professions with legal responsibility to report suspected child abuse and neglect has come about gradually over the last ten years. Many day care program directors are not fully aware of their responsibility. As a day care program determines how to live up to this responsibility, it is important to alert parents to the changing requirements of the law. Parents may have casual attitudes about picking up their children without realizing the serious consequences involved if reports of child neglect are lodged. It is helpful for the day care program to establish its own definition of when the program will report suspected child neglect. For example, in this paper, in order to distinguish between a less serious incident and an occasion which should be considered extreme lateness, the definition of "one hour or more after closing" has been used. If day care programs use such a definition in their written policies staff will know clearly when to contact authorities and parents will know what consequences will occur if the policies are violated.

When a Report is Filed

Once the day care program has reported suspected neglect of a child left after closing, the child protection agency has authority to assume physical custody of the child until the matter is investigated and resolved. Many directors have mixed feelings about the consequences of reporting suspected child neglect of children left after closing. On the one hand, the day care organization is relieved of the responsibility of caring for the child, for incurring liability, and for a continuing effort to locate parents. On the other hand, the child feels secure in the familiar environment of the day care facility and its staff. Representatives of a child protection agency or the police assigned to pick up the child are strangers. Even though these representatives are trained to offer assurance to children and sometimes have access to special resources such as emergency shelters, there is still the likelihood that the child will be upset by this action.

In some communities, the child protection agency has a policy of coming immediately to take responsibility for the child. In other communities the child protection agency may only accept responsibility for the case and begin an effort to locate parents but still request that the day care organization continue caring for the child. In such cases the child protection agency may authorize an employee of the day care program to take the child to his/her own home.

Thus, there is no pat answer to the question of when the day care program should relinquish responsibility for the child. Some programs will take the safest course and seek relief of responsibility for this complex problem as

quickly as possible. Other programs will prefer to take some risk and continue to care for the child until the parents are located or a decision is made by the child protection agency to remove custody of the child from the parents and to make other plans for care outside the home.